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Ng See Chong v Tan Lai Meng & Ors

B HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCVC-62–04 OF 2016
SM KOMATHY JC
17 MARCH 2017

C *Damages — Measure of damages — Contract and tort — Whether general rule that damages for tort and breach of contract should be assessed as at date of breach should not be followed if circumstances warrant it — Whether assessment of damages as at different date should be undertaken if that more adequately compensated party for wrong done to it*

D The plaintiff, who claimed he had possession of the original issue document of title ('IDT') to his property at all material times, discovered on doing a land search in November 2013, that, without his knowledge, his property had been transferred to the first defendant who had thereafter transferred it to the second
E defendant, who, in turn, had transferred it to the third and fourth defendants who had charged it to the fifth defendant as security for a loan. In his instant suit, the plaintiff averred that the sixth, seventh and eighth defendants had been negligent in transferring the property to the first defendant. The IDT that was used to transfer the property to the first to fourth defendants was one that
F had been issued by the sixth to eighth defendants to an unknown person. Pursuant to a consent order, the sixth to eighth defendants ('the defendants') settled the suit by agreeing to compensate the plaintiff for the loss of his property. The property itself could not be returned to the plaintiff since it had been sold to bona fide purchasers for value. To assess the loss, the defendants
G argued that the loss should be based on the value of the property at the date the tort was committed, ie when the transfer of the property was registered in the name of the first defendant. The plaintiff, however, contended that his loss should be based on the value of the property as at the date of the court's judgment.

H **Held,** assessing the loss suffered by the plaintiff at RM600,000:

(1) The court's task was to put the plaintiff into as good a position financially as he would have been in if the property had not been fraudulently
I transferred to the first defendant. It could not be gainsaid that the plaintiff would, at the date of judgment, still have had ownership of the property if its transfer to the first defendant had not been registered by the sixth to eighth defendants. The plaintiff was precluded from recovering the property as it had been sold off to bona fide purchasers for

value. In the circumstances, the plaintiff was entitled to claim as his loss the value of the property as at the date of judgment (see para 19).

(2) The loss suffered by the plaintiff was assessed at RM600,000 based on the valuation reports submitted by the parties. Even the valuation report produced by the sixth to eighth defendants alluded to the value of the property as at the date of judgment (see para 20).

(3) The general rule that damages for tort or breach of contract are assessed as at the date of breach was subject to many exceptions. It was flexible and could be departed from in order to give adequate compensation for the wrong done to the plaintiff. The court should not mechanically apply the general rule in circumstances where assessment of damages as at another date might more accurately reflect the overriding compensatory rule which was, so far as was possible, to put the plaintiff in the position he would have been in if he had not suffered the wrong complained of (see paras 8 & 14).

[Bahasa Malaysia summary

Plaintif, yang mendakwa dia memiliki dokumen hakmilik asal ('dokumen') kepada hartanahnya pada masa material, menemui semasa membuat carian tanah pada bulan November 2013, bahawa, tanpa pengetahuannya, hartanahnya telah dipindahkan kepada defendan pertama yang kemudiannya memindahkannya kepada defendan kedua, yang sebaliknya telah memindahkannya kepada defendan ketiga dan keempat yang mencajkannya kepada defendan kelima sebagai jaminan untuk pinjaman. Dalam tindakannya ini, plaintif berhujah bahawa defendan keenam, ketujuh dan kelapan telah dengan cuai memindahkan hartanah tersebut kepada defendan pertama. Dokumen yang digunakan untuk memindahkan hartanah tersebut kepada defendan pertama kemudiannya kepada defendan keempat adalah satu yang telah dikeluarkan oleh defendan keenam hingga kelapan dan kepada orang yang tidak diketahui. Berikutan perintah izin, defendan keenam hingga kelapan ('defendan-defendan') menyelesaikan tindakan tersebut dengan bersetuju untuk memberi pampasan kepada plaintif bagi kerugian terhadap hartanahnya. Hartanah itu sendiri tidak boleh dikembalikan kepada plaintif memandangkan ianya telah dijual kepada pembeli-pembeli bona fide untuk nilai. Untuk menaksir kerugian, defendan-defendan berhujah bahawa kerugian patut didasarkan ke atas nilai hartanah pada tarikh tort dilakukan, iaitu apabila pemindahan hartanah tersebut didaftarkan di atas nama defendan pertama. Plaintif walau bagaimanapun, berhujah bahawa kerugiannya patut didasarkan atas nilai hartanah pada tarikh penghakiman mahkamah.

Diputuskan, menaksir kerugian yang dialami oleh plaintif pada nilai RM600,000:

(1) Tugas mahkamah adalah untuk meletakkan plaintif dalam kedudukan

yang baik dari segi kewangan, keadaan sepatutnya jika hartanah tidak dipindahkan secara fraud kepada defendan pertama. Ia tidak boleh dinafikan bahawa plaintif akan pada tarikh penghakiman, masih memiliki hartanah tersebut jika pindahannya kepada defendan pertama tidak didaftarkan oleh defendan keenam hingga kelapan. Plaintif dihalang daripada mendapatkan kembali hartanah tersebut kerana ia telah dijual kepada pembeli-pembeli bona fide untuk nilai. Dalam keadaan, plaintif berhak untuk menuntut kerugian dalam nilai hartanah pada tarikh penghakiman (lihat perenggan 19).

(2) Kerugian yang dialami oleh plaintif ditaksirkan pada RM600,000 berdasarkan laporan penilaian yang dikemukakan oleh pihak-pihak. Laporan penilaian yang dikemukakan oleh defendan keenam hinggga kelapan juga merujuk kepada nilai hartanah pada tarikh penghakiman (lihat perenggan 20).

(3) Peraturan am untuk tort atau kemungkiran kontrak yang ditaksirkan pada tarikh kemungkiran adalah tertakluk kepada pengecualian yang banyak. Ia adalah fleksibel dan boleh menyimpang untuk memberi pampasan yang wajar bagi kesalahan yang dibuat terhadap plaintif. Mahkamah tidak patut secara mekanik menggunapakai peraturan am dalam keadaan di mana taksiran ganti rugi pada tarikh lagi satu mungkin lebih tepat membayangkan pampasan yang melampaui, sejauh mungkin, untuk meletakkan plaintif dalam kedudukan sepatutnya jika dia tidak mengalami kesalahan yang diadukan tersebut (lihat perenggan 8 & 14).]

Notes

For a case on contract and tort, see 6(1) *Mallal's Digest* (5th Ed, 2015) para 370.

Cases referred to

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105, PC (refd)

Dodd Properties (Kent) Ltd and another v Canterbury City Council and others [1980] 1 All ER 928, CA (folld)

Johnson and another v Agnew [1980] AC 367, HL (refd)

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL (refd)

Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801, HL (refd)

Tan Goat Eng & Anor v Rozdenil bin Toni (suing as administrator of the estate of Toni bin Ismail, deceased and Normy bt Mohamed Khatif, deceased) [2015] 4 MLJ 831; [2015] 6 CLJ 486, CA (refd)

Gunasegaran s/o Suppiah (Nanda Kumar a/l PS Suppiah with him) (AM Ong & Partners); Rashpal Singh a/l Khajan Singh (Rashpal Singh & Co) for the plaintiff.

No appearance entered for the first defendant.

Iruthaya Raj A (Raj Selva & Co) for the second defendant.

Norazali bin Nordin (Maxwell Kenion Cowdy & Jones) for the third and fourth defendants.
Lim Ta Wai (Khong & Son) for the fifth defendant.
Suhaila bt Haron (Assistant State Legal Advisor, Perak Legal Advisors Office) for the sixth, seventh and eighth defendants.

SM Komathy JC:

[1] The core issue in these proceedings for breach of tortuous duty is whether the court has the power to order that damages should be assessed as from the date of judgment instead of the date the tort was committed.

[2] The brief facts are that the plaintiff was the registered and beneficial owner of all the land held under Geran 3128, Lot 45795 Mukim Hulu Kinta together with a residential house erected thereon known as No 14, Jalan Johore, Taman Canning 31400, Ipoh Perak ('the property'). On 1 November 2013, pursuant to a land search on the property, the plaintiff discovered that the property had been transferred to the first defendant, who had subsequently sold and transferred it to the second defendant on 2010. Thereafter the property was sold and transferred by the second defendant to the third and fourth defendants, who had then charged the same to the fifth defendant as a security for a loan taken by them. The sixth to the eighth defendants were the Pentadbir Hakmilik Negeri Perak, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak.

[3] The plaintiff brought this action against the defendants to recover his property and for damages. It was averred in the statement of claim that the original computerised document of title was at all material times in his possession and that the transfer of the property to the first defendant was done without his knowledge and consent. It was further averred that the sixth, seventh and eighth defendants were negligent in registering the transfer of the property to the first defendant. The issue document of title that was used to transfer the property to the first to fourth defendants was a subsequent computerised version of the issue document of title which had been issued by the sixth to the eighth defendants to an unknown person.

[4] On 15 December 2016, the parties came to an amicable settlement, and pursuant to a consent order, the sixth to the eighth defendants agreed to compensate the plaintiff for the loss of his property without any admission of liability.

[5] The essence of the submission of the senior federal counsel was that the damages awarded to the plaintiff for the loss of the property should be the value of the property at the date the tort was committed. This would be, she argued

the date when the plaintiff was deprived of his property, namely the date the transfer was registered to the first defendant. It was common ground that transfer was registered on 12 August 2009. In support of this argument, reliance was placed on the decision of the Court of Appeal in *Tan Goat Eng & Anor v Rozdenil bin Toni (suing as administrator of the estate of Toni bin Ismail, deceased and Normy bt Mohamed Khatif, deceased)* [2015] 4 MLJ 831; [2015] 6 CLJ 486 ('Tan Goat Eng').

[6] Against this argument, counsel for the plaintiff contended that the plaintiff's loss should be assessed on the basis of the value of the property as at the date of judgment and not the date the plaintiff was deprived of it. He founded his argument on the decision of the Privy Council in *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105 ('Datuk Jagindar Singh').

[7] Before I turn to the rival submissions, I propose to set out some general principles to be applied in assessing damages. The fundamental principles to be applied in the assessment of damages were formulated by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at p 39:

> that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[8] The general rule is that damages for tort or breach of contract are assessed as at the date of the breach. The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract.

[9] In turn now to examine the two cases cited by the parties in some detail. In the case of *Datuk Jagindar Singh*, the respondent had agreed to transfer her land at Kulai to the second appellant as security for an advance of $220,000 to the respondent on her account. The money was to be used to pay off a charge on the land and to pay the first appellant an amount payable by the brother-in-law of the respondent for whom the first appellant had stood surety in securing an advance from a bank. The first and second appellants were advocates and solicitors who acted for the respondent in preparing the necessary documents. The transfer and memorandum in favour of the second appellant were signed on 30 March 1974, and the transfer was registered on 22 July 1975. On 31 July 1975 the second appellant executed a transfer of the land in favour of the third appellant purportedly in consideration of $220,000 but no consideration in fact passed. Subsequently the land was again transferred to a land development company almost wholly-owned by the first appellant. The land was eventually subdivided and sold to the public. The plaintiff then brought an action to recover her land. On 21 November 1982 the

trial judge found the first and second appellants were guilty of fraud and awarded a sum of RM973,000 as damages. The sum of $370,260 was arrived at as being an estimate of the value of the Kulai land in July 1975, when the transfer to the second appellant was dated and registered. To this sum the learned trial judge added $518,364 as being a figure arrived at on the basis that property values generally had appreciated at the rate of 20%pa over the period from 1975–1982, a total increase of 140% over the period. He further added a sum of $84,000 as being the value of the dwelling house situated on the property as at July 1975. The aggregate of these three sums was $972,624 which was rounded off at $973,000.

[10] The appellants appealed to the Privy Council after the Federal Court dismissed their appeal. The Privy Council dismissed the appeal on liability but reduced damages from $973,000 to $797,000. In explaining the reduction, Lord Keith of Kinkel in delivering the judgment of the Privy Council said:

> Then it was maintained that the learned trial judge erred in adding to the value which he placed upon the land as at 1975 the value of the dwelling house situated thereon. In Their Lordships' opinion there is substance in this contention. The figure of $370,260 was arrived at upon the basis of the price which the land would fetch in the market if sold for development purposes. The existing use value would necessarily have been lower. Development of land would have involved demolition of the dwelling house. Therefore a purchaser who intended to develop the land would have added nothing to the price he was willing to pay in respect of its presence on the land. There is, accordingly, no tenable ground for adding to the value on the basis of a sale for development any element in respect of the dwelling house.
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> It was next contended that credit should have been given to the amount of $202,000 representing the $92,000 paid by the first appellant to the CK Bank in discharge of Devan's overdraft and $110,000 of the $121,819.80 paid by him to the HKS Bank in discharge of Dr Das's overdraft. As regards the $92,000, it is to be observed that the overdrawn account was in the name of Devan, not that of the respondent. It appears to Their Lordships nevertheless to be right to treat the discharge of the overdraft as being a benefit to the respondent which reduced to that extent the damage suffered by her as a result of the tort committed against her. This is particularly so when it is kept in mind that Devan had a certain beneficial interest in the land and that the respondent is claiming redress for the tort in her own name alone. Further, the overdraft was secured upon the land so as to be a charge upon the respondent's beneficial interest in it. Their Lordships are therefore of opinion that a deduction should be made in respect of the sum of $92,000. ...
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> It was further argued for these appellants that Abdul Razak J was wrong to include in the damages any sum in respect of the increment in value which he held would have accrued to the land, had the appellant not been wrongfully deprived of it, between the date of the deprivation and the date of judgment, and in any event that the increment of 140% had no evidential basis and was unjustified. *No doubt it is a general rule of law that the damages recoverable for a tort are to be assessed as at the date the tort was committed. But there are many exceptions to that rule, the most notable*

perhaps being the case of damages for personal injuries caused by negligence, which are assessed so as to take into account all loss suffered up to the date of trial having regard to the value of money at that time. The true test is what is just and reasonable in all the circumstances. The object of damages for the tort of deceit, as for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not been committed. In the present case there is no reason to doubt that if the respondent had not been tricked out of her land she would at the date of judgment still have been in ownership and possession of it bearing the value which in ordinary course it would have borne at that time. Further, if these appellants had not succeeded in bringing it about that the land was sub-divided into 70 lots and sold off to bona fide purchasers for value, the respondent would have been entitled to have the transaction with her set aside and to recover the land itself on the date that judgment was pronounced. So in Their Lordships' opinion the learned trial judge was right in principle to take into account in the assessment of damages the value which the land, if the respondent had not been deprived of it, would have borne at the date of judgment. Special considerations might have arisen if the respondent had been guilty of unreasonable delay in prosecuting her claim, but no suggestion of that has been made.

It remains to consider whether Abdul Razak J was entitled to find, as he did, that an increment in value of 140% would have accrued to the land between 1975 and 1982. The only relevant piece of evidence before him was a statement by the respondent's expert witness Chong that there had been a boom in property values during a period up to about 1979. The learned judge, however, expressed himself as proceeding on the view that it had become a matter of public and common knowledge that even if there had been no boom the normal annual rate of increase of land prices had always been generally about 20% a year. He said that this had been confirmed by about 700 land reference cases which had come before him over the past 11 months or so throughout Western Malaysia. The Federal Court did not criticise his approach, nor indeed advert to it at all. There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary quite widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge. As to whether or not it is so in Malaysia is a question upon which Their Lordships would hesitate to venture an opinion. The judiciary of Malaysia are the persons best qualified to answer the question. The learned trial judge has found the particular matter to be common and public knowledge there, and his finding has not been criticised by the Federal Court. Their Lordships are not prepared to interfere with that finding and accordingly reject the appellants' argument.

Finally, it was maintained for the appellants that Abdul Razak J. erred in allowing interest at 6% from July 1975 upon the sum representing the then value of the land, in addition to the 140% increment in value, because by doing so he had in substance compensated the respondent twice over for the same element of loss. In Their Lordships' opinion there has been no double compensation. The 140% increment compensates the respondent for the capital loss she has sustained through not having the ownership of the land at the date of judgment, whereas the 6%

> interest compensates her for not having had possession of the land, and thus enjoyment of its fruits, during the intervening period. In the result, the respondent and her family had to live in rented accommodation, with consequent expense, during that period, and it is fair that this should be the subject of compensation. It is the case, however, that the respondent was not dispossessed of the land until September 20, 1976, and it is from that date, not July 1975, that the interest should run. (Emphasis added.)

[11] In *Tan Goat Eng*, the case relied on by the sixth to eight defendants, the facts were these. The plaintiff was the administrator of the estates of his parents. Their estate included a piece of land. The plaintiff's brother, the second defendant, wrongfully sold and transferred the land to the third and fourth defendants by using a forged instrument. The plaintiff only discovered the transfer of the property by the use of a forged document after it had changed hands from the third and fourth defendants to the other defendants. He then brought an action for the re transfer of the property. The trial court did not set aside the transaction but ordered the third and fourth defendants to pay damages. The trial judge awarded as damages the value of property as at the date of judgment ie 3 July 2014.

[12] On appeal, the Court of Appeal affirmed the decision of the High Court but amended the date stipulated by the learned judge for the assessment of damages from the date of the judgment to the date ie 3 July 2014 to the date of the property was transferred by the plaintiff's brother to the third and fourth defendants by the use of a false power of attorney ie 17 July 2008. The Court of Appeal held that the date the tort was committed more accurately reflected the basis for and estimation of loss to be computed in light of the circumstances.

[13] Having read the judgment of the Court of Appeal, I find nothing in it that lends support to the position taken by the senior federal counsel that damages for loss of real property must be assessed at the date when the tort was committed. In that case, it is clear from para 24 of the judgment of the Court of Appeal that it directed that damages be assessed as at the date the tort was committed based on the circumstances in that case.

[14] The decision in *Datuk Jagindar Singh* illustrates that the rule that damages for tort or breach of contract are assessed as at the date of the breach is only a general rule and is subject to many exceptions. It is flexible and can be departed from in order to give adequate compensation for the wrong done to the plaintiff. The court should not mechanically apply this rule in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule. Hence, where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the

defendant's wrong a different date of assessment can be selected.

[15] The general rule was not applied in the assessment of damages in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 and *Dodd Properties (Kent) Ltd and another v Canterbury City Council and others* [1980] 1 All ER 928 ('Dodd Properties').

[16] In the latter case, *Dodd Properties*, the facts of this case may be taken from the headnote. The plaintiffs were respectively the owners and lessees of a building in which the second plaintiffs operated a garage and car sales business. In 1968 a multi-storey car park was erected next door to the plaintiffs' building. The defendants were the contractors for the construction of the car park and the subcontractors for its foundations. As a result of pile-driving operations for the foundations, serious structural damage was caused to the plaintiffs' building. The plaintiffs brought an action against the defendants in negligence and/or nuisance. The first plaintiffs claimed damages for the cost of repairs to the building and the second plaintiffs claimed damages for losses arising out of the prospective interruption to their business if and when the repairs were carried out. Liability was at first denied by the defendants but was admitted shortly before the hearing of the action in 1978, but the issue of quantum remained contested. The first plaintiffs had not carried out any repairs at the date of hearing, claiming that to have done so in 1970 (which was the earliest date when it was physically possible to have carried out repairs) would have caused them a degree of financial stringency and that in any event it would not have made commercial sense for them to have repaired the building before they were sure of recovering the expenditure from the defendants, because that expenditure was not going to produce a corresponding increase in income. The plaintiffs accordingly contended that the damages should be assessed as at the date of hearing, being £30,327 for the cost of repairs and £11,951 for the disruption to the business. The defendants contended that the damages should be assessed as at 1970, being £11,375 for the repairs and £4,108 for the disruption. The judge held that the damages were to be assessed as at 1970 because that was the date when it was reasonable for the plaintiffs to have commenced carrying out the repairs. In so holding the judge decided that any financial stringency caused to the first plaintiffs by carrying out the repairs in 1970 was an extrinsic factor and irrelevant. The plaintiffs appealed.

[17] In allowing the appeal, the Court of Appeal held that where a building was damaged by a tortious act and put in need of repair, the cost of repairs was to be assessed according to the broad and fundamental principle regarding damages, namely that they were compensatory and should as far as possible put the injured party in the same position as if the wrong had not been committed. Applying that principle, the cost of repairs was to be assessed at the earliest date when, having regard to all the circumstances, they could reasonably be

undertaken, rather than the date when the damage occurred.

[18] Similarly, in the law of contract, the date of breach rule is not a strict and inflexible rule. The court has the power to fix such other date if to follow it would give rise to injustice. See *Johnson and another v Agnew* [1980] AC 367.

[19] Reverting to the present case, the plaintiff was residing in Australia at the material time. He had inherited the property from his late father sometime in 1987. He had left for Asutralia in 1992 and came back to Malaysia occasionally to visit in mother who was living in Kuala Lumpur. He had brought this action as soon as he was able to do so upon discovering the fraud. The task of the court is to put the plaintiff into as good a position financially as he would have been if the property had not been fraudulently transferred to the first defendant. It cannot be gainsaid that the plaintiff would at the date of judgment still have ownership of the property if the transfer of the property to the first defendant had not been registered by the sixth to eighth defendants. The plaintiff is precluded from seeking to recover the property in this case as it has been sold off to bona fide purchasers for value. In the circumstances, the plaintiff who has been deprived of his property is entitled to claim as his loss the value of the land as at the date of judgment.

[20] In the circumstances, I assess the loss suffered by the plaintiff at RM600,000 based on the valuation reports submitted by the parties. It bears mention that even the valuation report produced by the sixth to eighth defendants only alluded to the value of the property as at the date of judgment.

The loss suffered by the plaintiff assessed at RM600,000.

Reported by Ashok Kumar